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STATE OF WASHINGTON
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No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Defendant/Appellant,

v.

MATHEW & STEPHANIE McCLEARY, on their own behalf and on behalf of Kelsey & Carter McCleary, their two children in Washington's public schools;

ROBERT & PATTY VENEMA, on their own behalf and on behalf of Halie & Robbie Venema, their two children in Washington's public schools; and

NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Plaintiffs/Respondents.

PLAINTIFF/RESPONDENTS' 2018 POST-BUDGET FILING

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I. SUMMARY OF THIS RESPONSE

This Supreme Court proceeding is the appellate review of a February 2010 Final Judgment. That judgment declared the State's *prior* funding formulas violated Article IX, section 1 of our State constitution. It was based on a 2009 trial with 55 witnesses and 566 exhibits.[1]

The State now asks this Court to do two things:

One- terminate this appellate review of the 2010 Final Judgment declaring the State's *prior* funding formulas unconstitutional,[2] and

Two- make a factual finding declaring the State's *new* funding formulas fully comply with Article IX, section 1.[3]

This is plaintiffs' response.

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[1] *RP 1-5659 and CP 2866-2971 (all witnesses & exhibits listed at CP 2946-2971).*

[2] *E.g., State Of Washington's Memorandum Transmitting The Legislature's 2018 Post-Budget Report ("State's 2018 Brief") at 2 ("The Court should...terminate review"), at 6 ("The Court should...terminate review"), at 3 (Issue #3: "Should the court relinquish its retained jurisdiction and terminate review?"), at 17 ("The Court should relinquish jurisdiction over this appeal and terminate review"), & at 18 ("the Court should relinquish its retained jurisdiction and terminate review").*

[3] *See, e.g., State's 2018 Brief at 2 ("the Court should hold the State has achieved full compliance with article IX, section 1 of the Washington constitution and with the Court's 2012 McCleary decision"), at 2 (Issue #1: "Is the State now in full compliance with article IX, section 1 of the Washington constitution?"), at 6 ("The Court should find that the State is in full compliance with article IX, section 1 and the 2012 McCleary decision"), at 8 (the November 2017 Order held the State is fully funding its new formulas for transportation, etc.), at 16 ("The State is now in full compliance with article IX, section 1 and this Court's 2012 decision"), & at 17 ("The Court should hold that the State has achieved full compliance with article IX, section 1 of the Washington constitution and with the Court's 2012 McCleary decision").*

One (the past). At this point:

- The 2010 Final Judgment's legal rulings on the meaning of Article IX, section 1 have been affirmed.

- The 2010 Final Judgment's factual determination that the State's *prior* funding formulas violated Article IX, section 1 has been affirmed.

- The 2018 legislature passed legislation addressing this Court's remedial order *(i.e., fund the State's new formulas by September 1, 2018)*.

- The 2018 legislature passed legislation addressing this Court's daily sanctions order *(i.e., $100,000 immediately payable every day beginning on August 13, 2015)*.

As for what is now in the **past**, the Final Judgment's legal and factual rulings have been affirmed and put to bed. And the State has now enacted legislation addressing this Court's remedial and sanctions orders. Plaintiffs accordingly recognize that continuing this appellate review from the underlying 2010 Final Judgment is no longer absolutely necessary. They recognize that termination of this appellate review will allow the State's *new* funding formulas to operate this upcoming school year without post-budget filings in this Court next year. Indeed, that's consistent with this Court's November 2017 Order, which noted the State's new program can operate with school district experience being the

judge of whether the State's new program funding proves adequate to comply with the ample funding mandate of Article IX, section 1.[4]

Two (the future). At this point:

- The State will be funding its *new* formulas by September 1, 2018.
- The State alleges its *new* formulas amply fund all ten components of the State's basic education program.
- Plaintiffs assert the *new* formulas do not provide ample funding.
- But the evidentiary record in this case contains no sworn testimony or trial court evidence addressing whether the *new* formulas do or do not amply fund all ten components of the State's basic education program.

As for the **future**, the State's *new* formulas do increase State funding. But since those new formulas did not exist during this suit's trial, this suit's appellate record does not have trial evidence proving whether or not that increase is constitutionally adequate to comply with the ample funding mandate of Article IX, section 1.

The appellate record in this case accordingly provides no evidentiary basis for this Court to rule at this point that the State's *new* funding formulas do in fact amply fund the State's basic education program in full compliance with Article IX, section 1. Indeed, such a declaration would be inconsistent with this Court's November 2017 Order,

[4] *November 15, 2017 McCleary Order at 37 ("At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate.").*

which held that school district experience (rather than this *McCleary* proceeding) will be the judge of whether the State's new funding formulas do in fact amply fund the State's basic education program in full compliance with Article IX, section 1.[5]

II. ADDRESSING THE PAST: THE STATE'S PRIOR FUNDING FORMULAS

A. Further Review Is Not Needed To Confirm The Trial Court's Legal Rulings *(the meaning of Article IX, section 1)*

This Court's January 2012 decision unanimously affirmed the legal rulings in the February 2010 Final Judgment.[6] It unequivocally cemented the legal meaning of Article IX, section 1:

- "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education."[7]
- This right to an amply funded education is each Washington child's paramount right under our State Constitution.[8]

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[5] *November 15, 2017 McCleary Order at 37 ("At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate.").*

[6] *McCleary, 173 Wn.2d at 514-529 (majority, per Stephens, J.) and at 547 (concurrence/dissent per Madsen, C.J.) ("I agree with Justice Stephens' articulation of the State's duty to fund education under article IX, section 1 of the Washington Constitution").*

[7] *McCleary, 173 Wn.2d at 483 (underline added); accord, August 2015 McCleary Order at 2 ("In McCleary, 173 Wn.2d at 520, we held that the State's 'paramount duty' under article IX, section 1...not only obligates the State to act in amply providing for public education, it also confers upon the children of the state the right to be amply provided with an education. Seattle Sch. Dist. 1 v. State, 90 Wn.2d 476, 513") (underline added); McCleary Final Judgment at CP 2903, ¶148 (quoting that Seattle School District ruling).*

- Unlike rights framed in the negative to restrict government action, this is a positive constitutional right that requires government action.[9]

- "all children" means every Washington child has this right: "each and every child"; "No child is excluded."[10]

- "paramount duty" means "the State must amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations."[11]

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[8] Seattle School District, 90 Wn.2d at 510-513; McCleary, 173 Wn.2d at 514-522; McCleary Final Judgment at CP 2903, ¶¶147-149.

[9] McCleary, 173 Wn.2d at 518-519.

[10] McCleary, 173 Wn.2d at 520 (underlines added); 2010 McCleary Final Judgment at CP 2908, ¶168 ("the word 'all' in Article IX, §1 means what it says.... It encompasses each and every child since each will be a member of, and participant in, this State's democracy, society, and economy. Article IX, §1 accordingly requires the Respondent State to amply provide for the education of every child residing in our State – not just those children who enjoy the advantage of being born into one of the subsets of our State's children who are more privileged, more politically popular, or more easy to teach."); more background at Plaintiffs' September 2010 Brief With Errata at 32-35.

[11] McCleary, 173 Wn.2d at 520 (underline added); August 2015 McCleary Order at 2 ("In McCleary, 173 Wn.2d at 520, we held that the State's 'paramount duty' under article IX, section 1 is of first and highest priority, requiring fulfillment before any other State program or operation"); 2010 McCleary Final Judgment at CP 2906, ¶159 (" 'Paramount' is not a mere synonym of 'important.' Rather, it means superior in rank above all others, chief, preeminent, supreme, and in fact dominant.... When a thing is said to be paramount, it can only mean that it is more important than all other things concerned.") (quoting Seattle School District v. State, 90 Wn.2d at 511) (underlines added); McCleary Final Judgment at CP 2906, ¶160 (reiterating this constitutional mandate's application: "During the trial, the State cross-examined many of the Petitioners' education witnesses as to whether they would prioritize education at the expense of other worthy causes and services, such as health care, nutrition services, and transportation needs. But this is not the prerogative of these witnesses – or even of the Legislature – that decision has been mandated by our State Constitution."); see also, sworn trial testimony of the Director of the State's Office of Financial Management (OFM) at RP 3561:2-15 (testifying that K-12 funding must come first before State programs for other matters such as public safety, human services, and health care).

- "ample" funding means "considerably more than just adequate or merely sufficient."[12]

In short: this Court has already affirmed the legal meaning of Article IX, section 1. Further review is not needed to affirm it again.[13]

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[12] *McCleary, 173 Wn.2d at 528 ("ample" in Article IX, section 1 means "considerably more than just adequate or merely sufficient") & 484 ("ample" in Article IX, section 1 means "fully sufficient, and considerably more than just adequate"); McCleary Final Judgment at CP 2907, ¶¶162-164 (quoting same dictionary this Court used in its 1978 Seattle School District decision ("AMPLE always means considerably more than adequate or sufficient"), and reiterating that "Consistent with this meaning, the Washington Supreme Court has held that Article IX, §1 requires the Respondent State to provide 'fully sufficient funds' and a 'level of funding that is fully sufficient' to provide for the education of all Washington children. Seattle School District v. State, 90 Wn.2d at 518, 537.").*

[13] *Although the State asserts in a footnote that this Court "rejected plaintiffs' attempt to import capital costs into article IX, section 1" [State's 2018 Brief at 8 n.2], plaintiffs never claimed the 2010 Final Judgment on appeal in this proceeding held that full or sole State funding of all capital costs is required by Article IX, section 1, or that the State's prototypical school allocation model for operating costs incorporated capital construction costs too. Instead, (1) plaintiffs accurately noted this Court had cautioned the State to account for how districts could secure the capital funds needed to achieve the full-day kindergarten and K-3 class sizes set by the State, and (2) the State then assured this Court that the State had done so.*

As to the first point, see, e.g., January 2014 McCleary Order at 5 (noting OSPI's estimate that school districts will need about $704 million to build the classrooms required to expand kindergarten to full-day and reduce K-3 class sizes to 17, and holding "the State must account for the actual cost to schools of providing these components of basic education") and at 7 (reiterating that State funding at that time did "not account for the additional capital investment needed to implement full-day kindergarten"); August 2015 McCleary Order at 3 (noting "the need for adequate capital expenditures to ensure implementation of all-day kindergarten and early elementary class size reductions") and at 6 ("as to both class size reductions and all-day kindergarten, it is unclear, and the State does not expressly say, whether the general budget or the capital budget makes sufficient capital outlays to ensure that classrooms will be available for full implementation of all-day kindergarten and reduced class sizes.... The State has provided no plan for how it intends to pay for the facilities needed for all-day kindergarten and reduced class sizes. As the court emphasized in its January 2014 order, the State needs to account for the actual cost to schools of providing all-day kindergarten and smaller K-3 class sizes."); October 2016 McCleary Order at 2-3 (noting "the need for adequate capital expenditures to ensure implementation of all-day kindergarten and early elementary class size reductions.")

As to the second point, see the State's oral argument before this Court's November 2017 Order, telling this Court how the State was providing large amounts of

B. Further Review Is Not Needed To Confirm The Trial Court's Factual Findings *(the State's prior funding formulas violated Article IX, section 1)*

This Court's January 2012 decision unanimously affirmed the factual declarations in the February 2010 Final Judgment.[14] For example, under the State's *prior* funding formulas:

- "State funding is not ample".[15]
- The State "is not amply providing for the equipping of all children residing in this State with the basic knowledge and skills included within the substantive 'education' mandated by Article IX, §1."[16]
- "The State's provisions for education do not provide all children residing in our State with a realistic or effective opportunity to become equipped with that knowledge, skill, or substantive 'education'".[17]

As this Court therefore succinctly declared when affirming the 2010 Final Judgment in this appeal: "The State has failed to meet its duty under article IX, section 1 by consistently providing school districts with a level

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school construction funding, and saying the State was not aware of any full-day kindergarten or K-3 class size reductions being prevented by lack of classroom space. [available at https://www.tvw.org/watch/?eventID=2017101066 , timestamp 18:55-20:50.]

[14] McCleary, *173 Wn.2d at 529-530 (majority, per Stephens, J.) and at 547 (concurrence/dissent per Madsen, C.J.) ("I agree with ... the conclusion that the current system is not operating at its constitutionally mandated levels").*

[15] McCleary *Final Judgment at ¶IV Conclusion (CP 2945).*

[16] McCleary *Final Judgment at ¶231 (CP 2929) ("The Respondent State is not amply providing for the equipping of all children residing in this State with the basic knowledge and skills mandated by this State's minimum education standards. The Respondent State is not amply providing for the equipping of all children residing in this State with the basic knowledge and skills included within the substantive 'education' mandated by Article IX, §1").*

[17] McCleary *Final Judgment at ¶231(a) (CP 2929).*

of resources that falls short of the actual costs of the basic education program."[18]

In short: this Court has already affirmed the trial court's factual findings and determination that the State's funding formulas at the time of trial violated Article IX, section 1. Further review is not needed to affirm the Final Judgment's factual findings about the State's *prior* funding.

C. Further Review Is Not Needed To Implement This Court's Remedial Orders *(fully fund all the State's new formulas by September 1, 2018)*

This Court's remedial orders required the State to fully fund all the *new* formulas the State said it was working on by no later than September 1, 2018.[19] This Court's recent November 2017 Order noted the

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[18] *McCleary, 173 Wn2d at 547.*

[19] *McCleary, 173 Wn.2d at 484 (noting Court was deferring to "the State's plan to fully implement the reforms by 2018") & 508 (reiterating Court's 2018 deadline was based on fact "the legislature declared its intent to implement the details of ESHB 2261 through a phased-in approach as recommended by the QEC, with full implementation by 2018. LAWS OF 2009, ch. 548, §114(5)(b)(iii)."); December 2012 McCleary Order at 2 (2018 is a "firm deadline for full constitutional compliance") (underlines added); October 2016 McCleary Order at 12-13 ("Any program for full state funding of basic education must therefore be fully implemented not later than September 1, 2018. ...[T]he legislature committed itself to enacting a fully complying program by the end of the 2017 session. This court has never purported to alter the compliance deadline. We conclude, based on the relevant legislation, that the State has until September 1, 2018, to fully implement its program of basic education, and that the remaining details of that program, including funding sources and the necessary appropriations for the 2017-19 biennium, are to be in place by final adjournment of the 2017 legislative session.").*

State met this deadline with one exception: the State fell about $1 billion short in funding its new salary formula by September 1, 2018.[20]

The State says its 2018 legislature provided that missing salary funding through two enactments adding $969.8 million by the September 1, 2018 start of 2018-2019 school year.[21]

Plaintiffs want to be clear: they do not believe the State's *new* funding formulas provide ample State funding for the education of all Washington children as Article IX, section 1 requires.

But the State has now at least provided for the funding of its *new* formulas by the September 1, 2018 deadline set by this Court's remedial orders. Plaintiffs accordingly recognize that continuing this proceeding's appellate review is no longer needed to ensure the State funds its *new* formulas by the remedial orders' September 1, 2018 deadline.[22]

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[20] *November 15, 2017 McCleary Order at 41 (concluding: "by all relevant estimates, it appears EHB 2242 and the 2017-19 budget fall short by about a billion dollars in fully funding the salary increases by the 2018-19 school year") & 2 ("Until the State enacts measures that fully implement its program of basic education by the September 1, 2018 deadline, it remains out of compliance").*

[21] *State's 2018 Brief at 9-11 (asserting that ESSB 6030 [supplemental operating budget] added $775.8 million in the 2018-2019 fiscal year for the first ten months of the 2018-2019 school year, and E2SSB 6362 (McCleary bill) committed the State to adding $194.0 million in the 2019-2020 fiscal year for the last two months of the 2018-2019 school year); accord Legislature's 2018 Report at 12-13. Plaintiffs will trust that the State's representation to this Court that it will appropriate that $194 million is true.*

[22] *Supra, footnote 21.*

D. Further Review Is Not Needed To Determine The Monetary Sanction Amount Still Owed On July 1, 2018 *($18,209,687.67)*

This Court's sanctions order imposed a liquidated $100,000 legal obligation on the State every single day starting on August 13, 2015.[23] Since there are 1052 days from that date to the July 1, 2018 date the supplemental budget takes effect, and since 1052 times $100,000 equals $105.2 million, the State says it will fully pay the accrued sanction when its supplemental budget places $105.2 million in a Dedicated McCleary Penalty Account.[24]

But each day's $100,000 sanction was a liquidated obligation "effective immediately" and "payable daily".[25] Thus, as previous briefing has noted – and the State has never disputed – each day's $100,000 obligation accrued prejudgment interest at the statutory 12% rate until

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[23] *The August 13, 2015 sanctions order imposed a daily penalty in the liquidated sum of $100,000 per day "effective immediately", and "payable daily to be held in a segregated account". August 13, 2015 McCleary Order at 9-10; October 6, 2016 McCleary Order at 13 (the payable-daily penalty shall continue to accrue); and as background, September 11, 2014 McCleary Order (ruling the State in contempt of court).*

[24] *See, e.g., Legislature's 2018 Report at 23 (the $105.2 million placed in the Dedicated McCleary Penalty Account "represents the accrued penalty from August 13, 2015...through June 30, 2018"); State's 2018 Brief at 1-2 (the funds deposited into that account fully pay the sanction accruing from August 13, 2015 through June 30, 2018), at 2 ("the Court should find that the State has...paid the sanction"); at 2 (Issue #2: did the 2018 legislature deposit into the penalty account "funds sufficient to pay the accrued contempt sanction"), at 6 (the Court should find that "the 2018 legislature [did]...fully pay the contempt sanction that has accrued since August 2015"), at 14 (asserting the 2018 legislature fully paid the contempt sanction accrued from August 13, 2015 through June 30, 2018 with $105.2 million), at 15 ("The Court should...find that the State has fully paid the sanction"), & at 17 ("The Court should find that the State has fully paid the accrued contempt sanction").*

[25] *Supra, footnote 23.*

paid.[26] Running a basic summation equation for that accruing interest over the 1052 days of $100,000 sanctions yields an accrued interest total of $18,209,687.67.[27]

This $18 million shortfall might seem akin to a "rounding error" to government officials in charge of an over $40 billion biennium State budget. But $18 million is not trivial to a struggling middle school student excluded from the State's most recent LAP funding increase because his school has "only" a 49% poverty rate. Or a non-English speaking elementary school student excluded from the State's most recent TBIP funding increase because she hasn't made it to high school yet. Or a troubled high school student left without timely counseling under the State's partial-FTE funding of school mental health counselors. Or a disabled student in a school district whose disabled student population exceeds the 13.5% cap on the State's special education funding.

In short: the supplemental budget that commences on July 1, 2018 fails to fund $18,209,687.67 of the monetary sanction accrued through

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[26] *Plaintiffs' 2016 Post-Budget Filing at 29 & 45. Accord, e.g.,* Rekhter v. Washington Department of Social & Health Services ["DSHS"], *180 Wn.2d 102, 124, 323 P.3d 1036 (2014) ("Prejudgment interest is available...when an amount claimed is 'liquidated' "); Pierce County v. State, 144 Wn.App. 783, 855, 185 P.3d 594 (2008) (trial court abused its discretion by denying prejudgment interest on liquidated damages owed by State); State v. Sims, 1 Wn.App.2d 472, 476, 406 P.3d 649 (2017) (affirming interest on monetary sanctions imposed against the Washington Department of Social and Health Services ["DSHS"]).*

[27] *The State surely knows this accrued interest number since it has previously assured this Court that its Treasurer's Office was keeping account of the accruing amount owed.*

June 30, 2018. But this Court does not need to continue this appellate review to rule right now that this liquidated $18,209,687.67 amount is (and will be every day after June 30, 2018 still be) due and owing under this Court's August 13, 2015 sanctions order.

E. Conclusion Regarding What's Now In The Past
(the State's prior funding formulas and the trial court's corresponding Final Judgment)

The Final Judgment's legal rulings have been affirmed. Its factual findings regarding the State's *prior* funding formulas have been affirmed. The State has now enacted legislation addressing this Court's remedial order requiring the State to fully fund *new* formulas by September 1, 2018. And determining the $18,209,687.67 sanctions amount left unfunded does not require a continuation of this appellate proceeding.

Plaintiffs accordingly recognize that this Court's appellate review of the trial court's 2010 Final Judgment on the State's *prior* funding formulas can at this point finally end – thereby allowing the State's *new* basic education program formulas to operate this upcoming school year without any post-budget filings in this *McCleary* case next year. In short: allow the State's new program to operate, with school district experience being the judge of whether the State's new funding levels prove adequate

to comply with Article IX, section 1's ample funding mandate for the education of all Washington children.[28]

III. ADDRESSING THE FUTURE: THE STATE'S NEW FUNDING FORMULAS

A. Context Motivating The Factual Finding Now Requested By The State

This year, the State submitted its seventh post-budget filing in this *McCleary* proceeding. After all those annual reports, plaintiffs can understand how elected officials have grown weary with what some call "*McCleary* fatigue".

These past few years, the State has worked hard to increase State school funding by billions of dollars in response to this Court's January 2012 *McCleary* decision.[29] After all that work, plaintiffs can understand that elected officials don't want to hear any more complaints

[28] *Cf. November 15, 2017 McCleary Order at 37 ("At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate.").*

[29] *The State notes it has added billions of dollars to State school funding from the 2011-2012 fiscal year to the 2018-2019 fiscal year. E.g., State's 2018 Brief at 16 (noting the State added billions of dollars between the 2011-2012 fiscal year and the 2018-2019 fiscal year); similarly Legislature's 2018 Report at 6-10 & 25, see also at 18-22 (various categorical increases). Plaintiffs do not digress into addressing the State's self-serving characterizations of its increases [e.g., Legislature's 2018 Report at 3 ("substantial increases") and at 4 ("unprecedented increases")] because the misleading nature of such generalized characterizations have been previously addressed in prior post-budget filings. E.g., Plaintiffs' 2017 Post-Budget Filing at 10-15 & 17-18.*

about the State violating the paramount duty, ample funding, and all children requirements of Article IX, section 1.

Plaintiffs can therefore understand why the State would like this Court to now block complaints about the State's *new* funding levels. Hence the State's request to gag and bury such complaints by issuing a preemptive factual finding that the State's *new* funding levels have been proven to in fact comply with the paramount duty, ample funding, and all children requirements of Article IX, section 1.[30]

The following pages explain why plaintiffs object.

B. No Trial Has Proven The Factual Finding The State Now Requests

There has been no trial on the question of whether the State's *new* funding levels for its revised basic education program comply with the paramount duty, ample funding, and all children requirements of Article IX, section 1.

The State accordingly cited no witness examination or cross under oath on that compliance question. It cited no court-admitted exhibits on that question. It cited no evidence in the appellate record proving the fact it wants this Court to now declare – i.e., that the State's *new* funding levels comply with Article IX, section 1.

[30] *Supra, footnote 3.*

In short: the State's demand that this Court issue a factual finding declaring that the State's *new* funding levels comply with Article IX, section 1 lacks evidentiary proof. Plaintiffs accordingly object.

C. The State's Now Attempting To Shut The Courthouse Door That It Previously Proclaimed Would Always Be Open

Plaintiffs' prior post-budget filings pointed out various ways in which the State's *new* funding formulas fell short. The State objected that this Court cannot rule on the State's *new* funding and formulas because this suit's appellate record does not address them – and insisted "the courthouse door will be open to plaintiffs" who want to claim in another suit that the State's *new* funding does not comply with Article IX, section 1.[31]

Plaintiffs object to the State's new demand that this Court now issue a factual finding declaring that the State's *new* funding levels comply with Article IX, section 1 because, frankly, the State will then cite that declaration to shut the courthouse door that the State previously insisted would always be open to plaintiffs who claim those *new* funding levels do not comply.

[31] *State's 2017 Post-Budget Filing at 33.*

D. This Court's November 2017 Order Did Not Make The Factual Finding That The State's 2018 Post-Budget Filing Requests

The State asks this Court to declare that its November 2017 Order made a factual finding that the dollar funding levels provided by the State's *new* formulas do in fact achieve full compliance with Article IX, section 1's ample funding mandate.[32]

But this Court's November 2017 Order did not make that factual finding. Instead, as the State's 2018 court filing acknowledges, this Court simply deferred at this point to the legislative branch's assurances, and thus deemed at this point that the State's *new* program funding formulas satisfied a "reasonably likely to achieve standard" since they fell within the legislature's range of discretion.[33]

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[32] *Supra, footnote 3.*

[33] *Legislature's 2018 Report at 2 (this Court's November 2017 Order was based on its "deeming that the education policies and funding levels in that legislation [EHB 2242] fell within the range of discretion granted to the legislature under Article IX's paramount duty") (citing November 2017 Order at 37). The State's claim that its supplemental budget "completed the final legislative step identified by this Court as necessary to achieve full compliance with Article IX" (Legislature's 2018 Report at 24) accordingly misses the point of this Court's November 2017 Order – for it did not make the factual finding of full compliance the State now requests. To the contrary, the November 2017 Order expressly declared that school districts' upcoming experience with the State's new funding formulas – not this McCleary proceeding – would be the judge of whether the new formulas in fact provide the ample funding for all children mandated by Article IX, section 1. November 2017 Order at 37 ("The legislature's actions as to these components are not perfect, but the legislature has acted within the broad range of its policy discretion in a manner that 'achieves or is reasonably likely to achieve' the constitutional end of amply funding K-12 basic education. McCleary, 173 Wn.2d at 519. At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate."). [Plaintiffs also note that the State's suggestion that this Court has ruled on "Article IX" in general rather than just the ample funding mandate of section 1 is erroneous – for as prior briefing (and the*

That's not a remarkable conclusion since there is no evidence in the trial court record about the *new* formulas adopted after trial. But that conclusion is not a factual finding by this Court that the *new* funding formulas adopted after trial do in fact provide the ample funding levels Article IX, section 1 requires.

E. The Factual Finding Requested By The State Contradicts This Court's November 2017 Order

The State has repeatedly alleged in this appellate proceeding that its *new* formulas will amply fund the education of all Washington children, and plaintiffs have repeatedly replied how the *new* formulas fall short.

This Court's November 2017 Order did not issue a final determination on this factual dispute – an unremarkable result since the trial court record in front of this Court did not address the State's *new* formulas. This Court's November 2017 Order accordingly declared instead that, at this point, the Court is going to let actual school district experience be the judge of whether or not the State's *new* basic education program funding proves to be constitutionally adequate: "At this point,

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State's own statements to this Court) confirm, this has never been a section 2 uniformity case. E.g., Plaintiffs' 2017 Post-Budget Filing at 19-20 & n.68; Plaintiffs' 2016 Post-Budget Filing at 41 & n.85 (quoting State's oral argument).]

the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate."[34]

The State now demands that this Court do the opposite: charge ahead and declare that the State's *new* funding levels comply with Article IX, section 1, without evidence of any school district's actual experience under those new formulas. Plaintiffs object because such a declaration contradicts the November 2017 Order's ruling that this Court will let school district experience be the judge of whether or not the State's *new* funding levels comply with Article IX, section 1.

F. The Judicial Declaration That's Consistent With This Court's November 2017 Order

The following paragraphs explain the judicial declaration that's consistent with this Court's November 2017 Order – namely, one which leaves no doubt that school district experience with the State's new basic education program funding levels will determine if those new funding levels comply with Article IX, section 1.

1. *The State's Basic Education Program*

This Court's January 2012 ruling reiterated the following points about the State's basic education program:

[34] *November 15, 2017 McCleary Order at 37.*

- ***"Basic Education"*** means "the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this state's democracy"[35] – more specifically: the knowledge and skills specified in the *Seattle School District* ruling (90 Wn.2d at 517-518), the four numbered provisions of ESHB 1209 (now RCW 28A.150.210), and the State's corresponding Essential Academic Learning Requirements (EALRs).[36]

- ***"Basic Education Program"*** means the program enacted by the State's legislative authority to provide every child a realistic and effective opportunity to become equipped with the knowledge and skills specified in the above "basic education" definition.[37]

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[35] McCleary, *173 Wn.2d at 524 n.21 ("For our purposes, the terms 'education' under article IX, section 1 and 'basic education' are synonymous"), at 483 ("The word 'education' under article IX, section 1 means the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this state's democracy") & at 521.*

[36] *Supra, footnote 35; McCleary, 173 Wn.2d at 523-524 (the legislature provided specific substantive content to the word education by adopting the four numbered provisions in ESHB 1209 and developing the EALRs; "Building on the educational concepts outlined in Seattle School District, ESHB 1209 and the EALRs identified the knowledge and skills specifically tailored to help students succeed as active citizens in contemporary society. In short, these measures together define a 'basic education' – the substance of the constitutionally required 'education' under article IX, section 1."). This Court's 2012 ruling was not a surprise because it reiterated prior legal rulings in the 2010 McCleary Final Judgment and 1978 Seattle School District decision.*

[37] *See, e.g., McCleary, 173 Wn.2d at 525 (quoting testimony of the Chair of the Joint Task Force on Basic Education Finance (the foundation for ESHB 2261) that the State must provide an opportunity that is* **realistic***); McCleary Final Judgment at CP 2910, ¶174 (quoting Seattle School District holding that "The* **effective** *teaching ... of these essential skills make up the minimum of the education that is constitutionally required"); McCleary Final Judgment at CP 2929, ¶231(a) ("When this ruling holds the State is not making ample provision for the equipping of all children with the knowledge, skills, or substantive 'education' discussed in this ruling, that holding also includes the court's determination that the State's provisions for education do not provide all children residing in our State with a* **realistic** *or* **effective** *opportunity to become equipped with that knowledge, skill, or substantive 'education' ").*

- The ten ***components*** of the State's basic education program include:

  (1) To/from pupil transportation.[38]

  (2) Materials, Supplies, and Operating Costs *("MSOCs", formerly referred to as "NERCs")*.[39]

  (3) Full-Day Kindergarten.[40]

  (4) K-3 class sizes of 17 students per classroom.[41]

  (5) Special education for children with disabilities.[42]

  (6) Remediation for struggling students *(Learning Assistance Program or "LAP")*.[43]

  (7) Transitional Bilingual Education for students whose primary language is other than English *(Transitional Bilingual Instructional Program or "TBIP", formerly referred to as English Language Learners or "ELL")*.[44]

  (8) Highly capable student instruction.[45]

  (9) 24 credit hour high school graduation requirement *(Core 24)*.[46]

  (10) Compensation sufficient to attract, recruit, and retain competent teachers, administrators, and staff to implement the State's basic education program.[47]

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[38] *See, e.g., McCleary, 173 Wn.2d at 496, 505-506, 526; cf. State's 2017 Post-Budget Filing at 3.*

[39] *See, e.g., McCleary, 173 Wn.2d at 497-499, 506, 509 n.17, 510, 533-535; cf. State's 2017 Post-Budget Filing at 5.*

[40] *See, e.g., McCleary, 173 Wn.2d at 505-506, 510, 526 n.22; cf. State's 2017 Post-Budget Filing at 4.*

[41] *See, e.g., McCleary, 173 Wn.2d at 510, 545; cf. State's 2017 Post-Budget Filing at 5.*

[42] *See, e.g., McCleary, 173 Wn.2d at 496, 505-506, 526; cf. State's 2017 Post-Budget Filing at 4.*

[43] *See, e.g., McCleary, 173 Wn.2d at 496, 505-506, 526; cf. State's 2017 Post-Budget Filing at 4.*

[44] *See, e.g., McCleary, 173 Wn.2d at 496, 505-506, 526; cf. State's 2017 Post-Budget Filing at 4.*

[45] *See, e.g., McCleary, 173 Wn.2d at 505-506, 526 n.22; cf. State's 2017 Post-Budget Filing at 3.*

[46] *See, e.g., McCleary, 173 Wn.2d at 505-506; cf. State's 2017 Post-Budget Filing at 3-4.*

2. *The Current Factual Dispute About Ample Funding*

As noted earlier, the State has now replaced the *prior* funding formulas found to be unconstitutionally low at trial with *new* funding formulas that increase State funding levels.

There is a factual dispute about the ampleness of the funding levels provided by these *new* formulas. The State alleges its *new* formulas will amply fund the education of all Washington children. Plaintiffs have repeatedly replied how the *new* formulas fall short. But there is no trial court evidence to prove who, as a matter of fact, is correct about the State's *new* funding formulas.

3. *Appellate Courts Are Not Trial Courts*

Plaintiffs recognize that a Supreme Court is not a trial court. It does not conduct trials. It does not observe witness examination and cross. It does not handle the admission of trial exhibits. It instead reviews the cold written trial court record of the proceedings below. And here, the trial court record below does not address the State's *new* program funding.

The State accordingly did not (because it could not) cite evidence or proof in the trial court record for the factual finding the State now asks

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[47] *See, e.g.,* McCleary, *173 Wn.2d at 497, 507, 536; cf. State's 2017 Post-Budget Filing at 4; Legislature's 2017 Report at 19 (EHB 2242 acknowledges that funding sufficient to hire and retain qualified staff is an element of the State's basic education program); accord, e.g., State's 2018 Brief at 7 ("salary allocations necessary to hire and retain qualified staff" are a component of the State's basic education program).*

this appellate court to make – i.e., a factual finding that declares the State's *new* basic education program funding levels do in fact comply with the previously noted ample funding for all children mandate of Article IX, section 1.

This lack of evidence or proof in the record before this Court is also why this Court's November 2017 Order declared that actual school district experience under the State's *new* funding formulas (rather than this *McCleary* Court) will be the judge of whether or not the State's *new* program funding proves to be constitutionally adequate.[48]

4. *Appellate Courts Set The Law For The Future*

Given the history noted above, the judicial declaration consistent with this Court's November 2017 Order is one that makes it clear that this Court has not issued a factual finding on whether the State's *new* basic education program funding levels do or do not in fact comply with Article IX, section 1. The judicial declaration consistent with this Court's November 2017 Order is one that reaffirms this Court's November 2017 conclusion that school district experience (rather than this *McCleary* case) will be the judge of whether or not the State's *new* funding formulas will prove to be constitutionally adequate to comply with Article IX, section 1.

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[48] *November 15, 2017 McCleary Order at 37 ("At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate.").*

G. Conclusion Regarding What Now Lies Ahead

(the State's new funding formulas and whether they in fact provide the ample funding required by Article IX, section 1)

The State has argued that its *new* program funding levels are intended to provide its 295 public school districts the ample funding mandated by Article IX, section 1, and alleged that its *new* program funding levels are reasonably likely to do so. Plaintiffs have countered with examples illustrating how the State's *new* program funding levels do not do that.

But this suit's appellate record has no trial evidence to prove who is in fact correct. The State's demand that this Court nonetheless declare that the State's *new* program funding levels do in fact comply with Article IX, section 1 is therefore a demand for judicial speculation.

Plaintiffs respectfully submit that speculating is not a proper role for this Court. Especially here, where the factual finding demanded by the State preemptively shuts the courthouse door to a future plaintiff seeking to prove the State's *new* program funding levels violate Article IX, section 1. Especially here, where the State itself has previously assured this Court that the courthouse door would always be open for such a plaintiff. And especially here, where this Court's November 2017 Order told our public school students that their schools' upcoming experience (rather than this *McCleary* appeal proceeding) will be the judge of whether

the State's *new* funding formulas do in fact amply fund the State's basic education program for those students in full compliance with Article IX, section 1.[49]

This Court has reiterated in this case that its "constitutional responsibility is to the schoolchildren of this state who have an enforceable right under article IX, section 1 to an amply funded education."[50] And it has emphasized that fulfilling the State's constitutional responsibility under Article IX, section 1 requires the judicial branch to remain vigilant, because success in upholding Washington children's positive constitutional right to an amply funded education depends on continued vigilance on the part of the courts.[51]

The State's demand for a preemptive factual finding of full constitutional compliance, in contrast, asks the judicial branch to close the courthouse door, turn off the lights, and go to sleep.

Plaintiffs accordingly oppose the State's demand for a preemptive constitutional compliance declaration. The trial court record on appeal, the State's own "courthouse door will be open" assurance to this Court, and the recent November 2017 Order, all confirm a fundamental point:

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[49] *November 15, 2017 McCleary Order at 37 ("At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate.").*

[50] *November 15, 2017 McCleary Order at 2.*

[51] *McCleary, 173 Wn.2d at 547.*

the question of whether the State's *new* funding levels do in fact comply with the ample funding for all children mandate of Article IX, section 1 is a question to be resolved another day in another case – not a question to be gagged and buried here with a speculative factual finding of compliance today.

IV. CONCLUSION

Plaintiffs agree the State's appeal of the trial court's February 2010 Final Judgment could be terminated, because (1) this Court affirmed the trial court's legal ruling on the meaning of Article IX, section 1; (2) it affirmed the trial court's factual finding that the State's *prior* funding formulas violated Article IX, section 1; (3) the State has addressed this Court's remedial order by providing for the funding of the State's *new* formulas by September 1, 2018; and (4) calculating the interest amount that accrued on the liquidated $100,000/day penalty requires math rather than further Supreme Court proceedings.

Plaintiffs do not agree, however, that this Court should immunize the State's *new* funding formulas from Article IX, section 1 scrutiny by issuing a preemptive factual finding that the State's *new* program funding levels do in fact comply with the ample funding for all children mandate of Article IX, section 1.

A factual finding about the State's *new* program funding levels requires proven facts about those new funding levels. But there are no such facts in the appellate record of this suit's 2009 trial. Plaintiffs accordingly acknowledge the logic of this Court's November 2017 Order holding that the State's new program should at this point be allowed to operate, with actual experience being the judge of whether its new funding levels prove constitutionally adequate.[52]

RESPECTFULLY SUBMITTED this 30th day of April, 2018.

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[52] *November 15, 2017 McCleary Order at 37 ("At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate.").*

DECLARATION OF SERVICE

Laura G. White declares:

I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years. I am not a party to this action, and I am competent to be a witness herein. On April 30, 2018, I caused PLAINTIFF/RESPONDENTS' 2018 POST-BUDGET FILING to be served as follows:

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Defendant State of Washington

☒ Via Electronic Mail
☒ Via Supreme Court Web Portal
☒ Via U.S. First Class Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED in Seattle, Washington, this 30th day of April, 2018.

s/ Laura G. White
Laura G. White, Legal Assistant

FOSTER PEPPER PLLC

April 30, 2018 - 4:13 PM

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